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No. 97-5310

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DAVID R. BEACH and LINDA M. BEACH,
Petitioners,
v.
OCWEN FEDERAL BANK,
Respondent.

On Writ of Certiorari to the
Supreme Court of Florida

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

May an action for the statutory right of rescission provided by the Federal Truth in Lending Act, 15 U.S.C. Section 1635, be revived as a defense in recoupment beyond the 3-year limit on the right of rescission set forth in Section 1635(f)?

PARTIES

In addition to the parties listed in the caption, Great Western Bank, f/k/a Great Western Savings, was a party to the proceedings in the Florida state courts.

LIST PURSUANT TO RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, respondent states the following:

> Ocwen Financial Corporation is the parent of respondent and all of respondent's subsidiaries are wholly owned.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	(i)
PARTIES	ii
LIST PURSUANT TO RULE 29.6	iii
TABLE OF AUTHORITIES	vii
INTRODUCTION	1
STATEMENT	2
1. Regulatory Background	2
2. Facts of the Case	4
SUMMARY OF ARGUMENT	6
ARGUMENT	10
CONGRESS IN 15 U.S.C. § 1635(f) CATEGORICALLY RESTRICTED THE FEDERAL RIGHT OF RESCISSION UNDER TILA TO THREE YEARS AND THERE IS NO BASIS IN STATUTORY OR COMMON LAW TO REVIVE THAT RIGHT AS A DEFENSE IN RECOUPMENT	10
A. The Plain Language Of § 1635(f) Categorically States That The Federal Right Of Rescission Embodied In That Provision "Shall Expire" After Three Years And Thus Petitioners' Claim Is Barred By That Provision	12
B. The Structure Of TILA's Remedial Provisions Demonstrates That Congress Did Not Intend To Extend The Federal Right Of Rescission By Way Of Recoupment	15
C. Congress Relied Upon State Law To Provide Any Right Of Rescission After The Three-Year Period For Asserting A Federal Right Of Rescission Has Expired	17

TABLE OF CONTENTS—Continued

Page

D. Under This Court's Decisions, Congress's Statutory Scheme in TILA Eliminates Any Basis For Creation By Courts Of A Federal Defense Of Rescission By Way Of Recoupment 22

1. There is no basis for supplementing Congress's carefully reticulated remedial scheme by providing a judicially created federal common law remedy in recoupment 23

2. This Court's prior decisions granting recoupment rights are readily distinguishable from this case 24

E. Section 1635(f) Reflects Congress's Recognition That A Federal Right Of Rescission For Violations Of TILA That Lacked An Absolute Three-Year Time Limit Would Grant Unwarranted Windfalls To Borowers, Would Impose Unjustified Penalties On Lenders And Particularly On Their Assignees And Would Severely Disrupt And Harm Secondary Mortgage Markets 28

CONCLUSION 31

TABLE OF AUTHORITIES

CASES Page

American Pipe & Constr. Co. v. *Utah*, 414 U.S. 538 (1974) 25
Bull v. *United States*, 295 U.S. 247 (1935) 9, 25, 26
Burnett v. *New York Cent. R.R.*, 380 U.S. 424 (1965) 20
City of Milwaukee v. *Illinois & Mich.*, 451 U.S. 304 (1981) 24
Cockrum v. *Pattillo*, 439 S.W.2d 632 (Ark. 1969) 23
Connecticut Nat'l Bank v. *Germain*, 503 U.S. 249 (1992) 20
Davis v. *FDIC*, 620 F.2d 489 (5th Cir. 1980) 10
Dunlap v. *Peirce*, 168 N.E. 277 (Ill. 1929) 23
Ed Miller & Sons, Inc. v. *Earl*, 502 N.W.2d 444 (Neb. 1993) 23
Erie R.R. v. *Tompkins*, 304 U.S. 64 (1938) 23
Good Samaritan Hosp. v. *Shalala*, 508 U.S. 402 (1993) 12
Isbrandtsen Co. v. *Johnson*, 343 U.S. 779 (1952) 9, 23, 27
King v. *California*, 784 F.2d 910 (9th Cir. 1986) 12
Lampf, Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson*, 501 U.S. 350 (1991) 13
Loma Vista Dev. Co. v. *Johnson*, 180 S.W.2d 922 (Tex. 1944) 23
Morris Plan Leasing Co. v. *Bingham Feed & Grain Co.*, 143 N.W.2d 404 (Iowa 1966) 23
Northwest Airlines, Inc. v. *Transport Workers Union*, 451 U.S. 77 (1981) 9, 24
O'Melveny & Myers v. *FDIC*, 512 U.S. 79 (1995) 23
Reiter v. *Cooper*, 507 U.S. 258 (1993) 9, 25
Rothensies v. *Electric Storage Battery Co.*, 329 U.S. 296 (1946) 28
Russello v. *United States*, 464 U.S. 16 (1983) 16
Thompson v. *Rhodehamel*, 127 P. 572 (Wash. 1912) 23
United Sav. Ass'n v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365 (1988) 15
United States v. *Dalm*, 494 U.S. 596 (1990) 13, 28
United States v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979) 26

TABLE OF AUTHORITIES—Continued

	Page
United States v. *Western Pac. R.R.*, 352 U.S. 59 (1956)	9, 25

STATUTES

Truth in Lending Simplification and Reform Act, Tit. VI, Pub. L. No. 96-221, 94 Stat. 132 (1980)	13
Truth in Lending Amendments of 1995, Pub. L. No. 104-29, 109 Stat. 271 (1995)	21
15 U.S.C. § 1601(a)	2
§ 1602(w)	3
§ 1610(d)	3, 17, 19
§ 1631	2
§ 1632	2
§ 1635	*passim*
§ 1635(a)	3
§ 1635(b)	3
§ 1635(e)(1)	3
§ 1635(f)	*passim*
§ 1635(i)(3)	4, 8, 18
§ 1638	2
§ 1640	4, 17
§ 1640(a)	8
§ 1640(e)	7, 8, 16, 17
§ 1666e	3

LEGISLATIVE MATERIALS

141 Cong. Rec. H9514-9516 (daily ed. Sept. 27, 1995)	21
141 Cong. Rec. S14568 (daily ed. Sept. 28, 1995)	21
H.R. Conf. Rep. No. 93-1429 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6148	20

FEDERAL REGULATIONS

12 C.F.R. § 226.23(a)(3)	14, 15
12 C.F.R. Part 226	2
Part 226, Supp. I, para. 23(a)(3)-3	14
16 C.F.R. Part 429	11

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

	Page
Black's Law Dictionary (6th ed. 1990)	12
Board of Governors of the Federal Reserve System, *Annual Report to Congress on Truth in Lending for the Year 1971* (Jan. 3, 1972)	11
Board of Governors of the Federal Reserve System, *Annual Report to Congress on Truth in Lending for the Year 1972* (Jan. 3, 1973)	20
Home Solicitation Sales, Consumer Credit Guide (CCH) (July 16, 1996)	11
1 Jay M. Lee, *Black's Treatise on the Rescission of Contracts and Cancellation of Written Instruments* (2d ed. 1929)	18
National Commission on Consumer Finance, *Consumer Credit in the United States* (Dec. 1972)	11
Webster's Third New International Dictionary (1971)	12

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BRIEF FOR RESPONDENT

INTRODUCTION

The Court in this case took the unusual step of crafting its own question to be addressed by the parties in review of the decision of the Florida Supreme Court holding that petitioners' assertion of a federal right of rescission as a defense in recoupment to respondent's foreclosure action was barred by 15 U.S.C. § 1635(f) of the Truth in Lending Act ("TILA"). The Court's question focuses on whether the three-year expiration period for asserting a federal right of rescission can be extended indefinitely so long as the borrower's claim is raised solely in defense to a foreclosure action brought by the lender.

Petitioners and their *amici* do not argue that the statute provides an express federal right of rescission in recoupment. Nor could they because the statute's express remedy is for damages for statutory violations and the statute expressly provides recoupment defenses in fore-

closure actions only for claims for actual or statutory damages. Nor have petitioners ever asserted that they have a right of rescission under state law. Thus, petitioners' claim ultimately reduces to the following counter-intuitive proposition: even though Congress stated categorically that the right petitioners seek to assert expires after three years, there remains a federal common law basis for reviving that right. This proposition does violence to the statutory language of Section 1635(f), the structure of TILA, this Court's decisions restricting the availability of federal common law rules of decision to supplement Congressional regulation, and the manifest common sense policies that plainly animated Congress to restrict the availability of rescission for violations of TILA to a period not to exceed three years. Accordingly, the decision of the Florida Supreme Court dismissing petitioners' federal rescission claim should be affirmed.

STATEMENT

1. Regulatory Background.

The Truth in Lending Act was enacted in 1968 with a stated purpose to ensure that borrowers receive "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit . . . ." 15 U.S.C. § 1601(a). To this end the statute and regulations adopted by the Board of Governors of the Federal Reserve System pursuant to delegated authority impose extensive disclosure obligations on the lender prior to the time a loan transaction is consummated. 15 U.S.C. §§ 1631, 1632, 1638; 12 C.F.R. Part 226. See Brief *Amici Curiae* of Federal Home Loan Mortgage Corporation, *et al.* ("Freddie Mac Br."), in support of Respondent at 7-8 (describing the detail and complexity of the disclosure requirements imposed upon lenders).

Recognizing that lending transactions have traditionally been regulated by state law, however, Congress was careful not to intrude too deeply into the contractual relationships between borrowers and lenders. Accordingly, Congress expressly declared that, unless provided in one of three specified sections,[1] "this subchapter and the regulations issued thereunder do not affect the validity or enforceability of any contract or obligation under State . . . law." 15 U.S.C. § 1610(d). Thus, the appropriate remedies for violations of TILA are provided for fully in the statute and violations of state law must serve as the basis for any additional relief.

There are two relevant remedial provisions in TILA: 15 U.S.C. §§ 1635 and 1640. The former provides, as its heading states, for a "right of rescission as to certain transactions" and the latter provides, *inter alia,* a private right of action to seek actual and statutory damages against lenders for violations of TILA. The structure of these two provisions is significantly different.

Section 1635, by its terms, does not apply to mortgage transactions involving the acquisition or initial construction of a consumer's dwelling. 15 U.S.C. §§ 1602(w), 1635(e)(1). It does apply to refinancings and home equity lines of credit. The primary protection afforded by this Section is the absolute right within three business days to rescind the transaction for any reason. This eliminates the security interest held by the lender. The lender also must return promptly any money or property given as earnest money or a down payment. 15 U.S.C. § 1635(b). Because the right to rescind may be ineffective if the borrower does not receive the disclosures mandated by TILA, the rescission remedy remains available until three days after "delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter. . . ." 15 U.S.C. § 1635(a). Thus, a material misstatement in the disclosure document, even if

[1] The provisions are Sections 125, 130 and 166, which are found at 15 U.S.C. §§ 1635, 1640, and 1666e, respectively.

largely technical, extends the borrower's unusual authority to rescind the transaction. This extraordinary right of rescission, however, "shall expire three years after the date of consummation of the transaction. . . ." 15 U.S.C. § 1635(f). After that, borrowers retain whatever rescission rights they have under state law. 15 U.S.C. § 1635 (i)(3).

Section 1640 provides an express private right of action to persons for TILA violations. The provision contains conventional language creating a one-year statute of limitations, but expressly permits a borrower to assert rights under § 1640 "as a matter of defense by recoupment or set-off" after the statute of limitation has run if the claim asserted is in answer to any action to collect a debt. Under this provision, the lender who violates TILA is liable to an individual plaintiff who obtained an installment mortgage loan for "any actual damage sustained" and for statutory damages measured as twice the amount of any "finance charge in connection with the transaction" presently with a minimum of $200 and a maximum of $2,000. Petitioners sought relief under both Sections 1635 and 1640 in this case and they received actual and statutory damages under the latter provision in recoupment, but the courts below rejected the assertion of a federal right to rescind, holding that this right had expired.

2. Facts of the Case.

The borrowers in this case, petitioners David and Linda Beach, entered into an agreement with Great Western Bank [2] on August 15, 1986, under which petitioners refinanced their house. Petitioners were loaned $97,300 to be repaid over 30 years at an adjustable rate of interest. The loan was secured by petitioners' house. J.A. 49. On November 1, 1991, more than five years after the initial

[2] Great Western assigned petitioners' mortgage loan to respondent Ocwen Federal Bank after the case was briefed and argued before the Florida Supreme Court. Ocwen was then substituted as the real party in interest in this litigation.

agreement was entered into, petitioners stopped repaying their loan. J.A. 49-50. In June 1992, Great Western filed suit in Florida's Circuit Court of the Fifteenth Judicial Circuit seeking to foreclose the mortgage on petitioners' property. J.A. 27.

Petitioners did not deny they defaulted on the loan. Instead, they asserted that violations of TILA at the 1986 loan closing justified rescinding the mortgage agreement. In seeking rescission, petitioners relied solely upon 15 U.S.C. § 1635 and 12 C.F.R. § 226.23.

After a bench trial, the circuit court found that Great Western had miscalculated and thus incorrectly disclosed to petitioners the payment schedule for the last 29 years of petitioners' loan, as well as the finance charge, in violation of TILA and the Federal Reserve Board's Regulation Z. Specifically, the court found Great Western erred by disclosing the final 348 monthly payments in an amount that was **58 cents** too much per month. This error aggregated over the entire period of the loan amounted to $201.84, which is equivalent to an error in the annual percentage rate of 0.0345%. J.A. 62.[3] The circuit court also found that Great Western had erred by excluding a $194.60 state "intangible [property] tax" payment from the total finance charge disclosed. J.A. 68-70. Consequently, Great Western notified petitioners they should expect to pay $176,519.21 in finance charges, which was $7.24 more than the correct amount of $176,511.97.

The trial court concluded that petitioners were entitled to recoup or set-off actual damages in the amount of $396 against the amount owing on the mortgage. J.A. 79. The court allowed recoupment or set-off of statutory damages in the amount of $1,000, as well as attorneys fees. J.A. 75-76, 80. The circuit court, however, denied petitioners'

[3] Because the mortgage contained a variable rate, which resulted in annual adjustments of the installment payment, petitioners in fact never actually paid the incorrect amount that Great Western originally disclosed. J.A. 55, 90.

claim that they were entitled to rescind the entire transaction. J.A. 74. The court reasoned, in part, that Section 1635(f) of TILA barred petitioners' effort to rescind the agreement more than five years after its consummation. In particular, the trial court ruled that "Congress' omission in 15 U.S.C. § 1635(f) of the recoupment and set-off language contained in 15 U.S.C. § 1640(e) clearly establishes the parameters for this court concerning the continued vitality of any rescission right which may have existed, after the expiration of three years." J.A. 74.

The Fourth District Court of Appeal affirmed, but certified to the Florida Supreme Court the question whether "[u]nder Florida law, may an action for statutory right of rescission pursuant to the Truth in Lending Act, 15 U.S.C.A. Section 1635, be revived as a defense in recoupment beyond the three-year limit on the right of rescission set forth in Section 1635(f)?" The Florida Supreme Court unanimously answered the question in the negative. J.A. 157-173.

The Florida Supreme Court refused "to disregard [the] statute's plain meaning," which commands that the federal statutory right of rescission "shall expire three years after the date of consummation of the transaction . . . ." J.A. 173, 164 (quoting 15 U.S.C. § 1635(f)). Moreover, the court concluded that the equitable remedy of recoupment was inapt here because " '[t]he further remedy of rescission under TILA is a penalty provision to the creditor, not a remedy required by equity and good conscience beyond the statutory period of three years.' " J.A. 173 (quoting *Beach* v. *Great Western Bank*, 670 So. 2d 986, 990 (Fla. Dist. Ct. App. 1996)).

SUMMARY OF ARGUMENT

A.

At bottom, the question posed by this Court in granting certiorari requires nothing more than an interpretation of language that, on its face, is utterly unambiguous—the

TILA "right of rescission shall expire three years after the date of consummation of the transaction . . . ." 15 U.S.C. 1635(f). Petitioners unquestionably seek to assert a federal statutory right of rescission, as opposed to a state common law right of rescission, more than three years after consummating the loan transaction. Accordingly, their claim is barred by the plain language of the statute. As this Court has repeatedly observed, the beginning and end of statutory interpretation is a careful parsing of the language chosen by Congress to achieve its legislative objectives. Given the clarity of Congress's language restricting the TILA right of rescission, the textual analysis, by itself, is wholly sufficient to decide this case in favor of respondent.

B.

The conclusion that the statutory right of rescission does not survive its express three-year expiration period, regardless of whether it is asserted affirmatively or by way of defense, is reinforced by the structure of TILA. First, it is manifest that Congress's choice of the concept of a "right" which "expires" is not accidental. A comparison between the language of Section 1635(f) and 15 U.S.C. § 1640(e) demonstrates that Congress did not mean for the three-year period to be an ordinary statute of limitation. Section 1640(e) states that an action for damages under TILA "may be brought . . . within one year from the date of the occurrence of the violation." This, of course, is the classic language of limitation. Congress's failure to use similar phrasing in Section 1635(f) plainly indicates that the "expiration" language was meant to provide a more definite period of termination than would arise under an ordinary statute of limitation.

C.

Although the "expiration" language, both alone and in context, plainly compels the conclusion that TILA's right

of rescission is extinguished for all purposes three years after the transaction being challenged, Congress further reinforced its intention to bar petitioners' use of rescission as a defense when it expressly dealt with the issue of recoupment in two additional provisions of TILA. In both instances Congress's express treatment of recoupment is inconsistent with petitioners' assertion of a federal right of rescission in this case.

First, in Section 1640(e) Congress granted persons in petitioners' situation a right to assert a claim for damages under Section 1640(a) "as a matter of defense by recoupment or set-off" in a suit brought by the lender to recover on a debt even after the one-year statute of limitation for bringing a damages action has run. The express grant of a statutory right of recoupment that does not apply to actions to rescind provided under Section 1635 plainly indicates that Congress did not intend to confer any right of rescission upon petitioners that survived the three-year expiration period.

Second, Congress recognized that there might be a "right of rescission in recoupment under State law." 15 U.S.C. 1635(i)(3). Accordingly, Congress expressly provided that such a state right of rescission remained unaffected by the statute. Again, the inference is unmistakable that Congress did not overlook the possibility that the federal right of rescission might be asserted in recoupment. Instead, Congress chose not to confer any such right under TILA. What Congress did provide was assurance that the safety net of *state law* rescission would remain available in recoupment to borrowers who could prove that they are entitled to the extraordinary relief of rescission, generally by demonstrating actual fraud, duress or coercion. No such claim has been made here.

D.

Given the manifest absence of any federal statutory basis for providing petitioners with a TILA right of rescission in recoupment, they ultimately must find a federal common law basis for the right they seek to assert in this Court. But this Court has repeatedly held that "once Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. Thereafter, the task of the federal courts is to interpret and apply statutory law, not to create common law." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 95 n.34 (1981).

Nor is there any support for petitioners' position in the general common law of equitable recoupment. The essence of that doctrine is that it is inequitable to allow an ordinary statute of limitations designed to prevent "stale" claims to preclude the defensive assertion of a claim arising out of the same "stale" transaction if the plaintiff asserts a timely claim that puts the matter before the court. In contrast, the purpose of § 1635(f) is to extinguish the TILA rescission right after three years and thus requires that the limit be applied regardless of whether the rescission right is asserted defensively or affirmatively.

Moreover, neither *Bull* v. *United States*, 295 U.S. 247 (1935); *United States* v. *Western Pac. R.R.*, 352 U.S. 59 (1956); nor *Reiter* v. *Cooper*, 507 U.S. 258 (1993), provides any basis for recognizing a right of rescission in recoupment where the asserted right is utterly unsupported by any reasonable notion of fairness or equity and where Congress plainly has indicated an intent not to authorize a federal right of rescission in recoupment. Congress's actions in enacting and amending TILA over the past 30 years bring this case within the rule of *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779 (1952), where the Court refused to apply recoupment at all because the remedy was inconsistent with Congress's manifest intent in enacting the statute at issue there.

E.

Finally, Congress's choice, in response to pointed requests by the Federal Reserve Board and the National Commission on Consumer Finance to impose a three-year deadline on the federal right of rescission, reflects a careful balance of the need to provide significant short-term protections to borrowers without imposing unjust penalties upon lenders and their assignees and to cabin the federal rescission right in a manner designed to promote an efficient secondary mortgage market. Judicial creation of a federal rescission right in recoupment after the three-year period has expired would undermine Congress's carefully balanced remedial scheme and do long-range harm to the interests of borrowers and lenders alike.

ARGUMENT

CONGRESS IN 15 U.S.C. § 1635(f) CATEGORICALLY RESTRICTED THE FEDERAL RIGHT OF RESCISSION UNDER TILA TO THREE YEARS AND THERE IS NO BASIS IN STATUTORY OR COMMON LAW TO REVIVE THAT RIGHT AS A DEFENSE IN RECOUPMENT.

In enacting TILA Congress conferred upon certain borrowers an extraordinary power to rescind certain loan agreements if the lender failed to comply with the material disclosure requirements of TILA, many of which are highly technical. The primary objective of 15 U.S.C. § 1635's federal right of rescission is to provide a relatively brief "cooling off" period for loans in which the borrower has granted a security interest on his or her house as part of the deal. See *Davis* v. *FDIC*, 620 F.2d 489, 491 (5th Cir. 1980). The right of rescission ensures that a borrower does not suffer permanently if he or she is stricken with "buyer's remorse" after reflecting for a couple of days upon the merits of entering into a particular loan agreement.

This commonly used tool for protecting consumers[4] carries a particularly powerful consequence if the lender fails to comply fully with the material disclosure obligations under TILA. As originally enacted in 1968, the borrower had a temporally unrestricted right to seek rescission. Thus, even on the 365th day of the last year of a mortgage, a borrower theoretically could assert a right to rescind and obtain all amounts paid in interest and other charges and eliminate the security interest the lender held on the borrower's house.

This unrestricted federal right of rescission necessarily placed a cloud on title and the enforceability of liens. These adverse consequences caused the Federal Reserve Board and the National Commission on Consumer Finance to recommend Congress enact an express three-year expiration period on the federal right of rescission. See Board of Governors of the Federal Reserve System, *Annual Report to Congress on Truth in Lending for the Year 1971* 19 (Jan. 3, 1972); National Commission on Consumer Finance, *Consumer Credit in the United States* 190 (Dec. 1972). Congress followed the suggestion of the Board and the Commission and subsequently amended § 1635 to add a subsection (f) that provides the federal right of rescission "shall expire" three years after the consummation of the transaction under consideration.

In effect, the three-day cooling-off period is extended until accurate disclosures are provided to the borrower,

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[4] The three-day cooling off period in TILA has counterparts in many other consumer protection laws. For example, the Federal Trade Commission has promulgated a trade regulation that ensures consumers receive a three-day cooling off period in connection with sales made at the consumer's home. *See* 16 C.F.R. Part 429. Likewise, virtually all states have adopted three-day cooling off statutes that apply to home sales of consumer products. *See generally* Home Solicitation Sales, 1 Consumer Credit Guide (CCH) ¶ 525 (July 16, 1996) (compiling state statutes). The common purpose of these consumer protection statutes is that they are intended to allow consumers to make informed decisions after having an opportunity to reflect on appropriate considerations.

but not longer than three years after the transaction is consummated. After three years, under the plain language of 15 U.S.C. § 1635(f), the federal right of rescission "shall expire." See *King* v. *California*, 784 F.2d 910 (9th Cir. 1986) (three year period not extended by equitable tolling). The question is whether there is any basis for courts to revive this remarkable right when Congress plainly intended for it to terminate automatically with the passage of three years. The answer is no.

A. The Plain Language Of § 1635(f) Categorically States That The Federal Right Of Rescission Embodied In That Provision "Shall Expire" After Three Years And Thus Petitioners' Claim Is Barred By That Provision.

As this Court repeatedly has recognized in recent years, the starting point and often the ending point of statutory interpretation is the language Congress has used to express its intent. See, *e.g.*, *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 409 (1993) ("The starting point in interpreting a statute is its language, for '[i]f the intent of Congress is clear, that is the end of the matter.'") (quoting *Chevron, U.S.A. Inc.* v. *Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). It is difficult to imagine how Congress could have been more clear in expressing its intention than by declaring that "[a]n obligor's right of rescission shall expire three years after the date of consummation of the transaction. . . ." 15 U.S.C. § 1635(f). By doing so, Congress did not enact an ordinary statute of limitation. To the contrary, the common understanding of "shall expire" is sweeping and definitive. Expire means "become void through the passage of time." Webster's Third New International Dictionary 801 (1971). See Black's Law Dictionary 579 (6th ed. 1990) ("expiration" means "termination from mere lapse of time"). The use of the mandatory term "shall" reinforces further the clear message that this is not a provision designed to confer any discretion on the courts to decide how to enforce the absolute time bar on asserting the federal right of rescission embodied in § 1635(f).

The categorical nature of the expiration period is reinforced by the other elements of § 1635. Congress added the three-year expiration period on top of a three-day cooling off period. This Court previously has recognized that the addition by Congress of a secondary deadline generally compels the conclusion that it is "an outside limit" that admits of no implied exceptions. See *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991) (second deadline "can have no significance in this context other than to impose an outside limit") (internal quotation marks omitted).

The rationale for implying an exception for recoupment either as a matter of statutory construction or under a federal common law theory is further undermined by Congress's inclusion of a single express exception to the three-year expiration period. Congress specifically extended the expiration period in the narrow situation where: 1) an agency empowered to enforce TILA "institutes a proceeding to enforce the provisions of this section within three years after" the transaction is consummated; 2) the agency finds that the lender has violated § 1635; and 3) the rescission claim arises out of the violation found by the agency. 15 U.S.C. § 1635(f). The presence of an express exception to the otherwise facially absolute bar to asserting rescission after three years leaves no room for courts further to supplement § 1635 by adding an exception for recoupment. See *United States* v. *Dalm*, 494 U.S. 596, 610 (1990) (statutorily specified exceptions should not be expanded through equitable recoupment).

What makes Congress's inclusion in 1980 of this extremely limited administrative exception to the expiration period in § 1635(f) particularly telling is that at that same time Congress was adding its express recoupment and set-off exception to the statute of limitations in § 1640. Truth in Lending Simplification and Reform Act, Pub. L. No. 96-221, §§ 612(a)(6), 615(a)(4), 94 Stat. 132, 176, 181 (1980). See p. 4, *supra*. Had

Congress intended to provide a similar exception to the three-year expiration period, it would have done so expressly. Its decision to leave the expiration period absolute provides additional evidence that Congress simply did not intend to permit borrowers to assert a federal rescission claim after three years, whether brought affirmatively or as a defense to a foreclosure action.

One last piece of evidence that § 1635 means what it says is the Federal Reserve Board's regulation implementing § 1635. The rule is not particularly illuminating, but it does support respondent's interpretation. The regulation provides, in pertinent part:

> the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first.

12 C.F.R. § 226.23(a)(3) (footnote omitted). Similarly, the Official Staff Commentary on the regulation states that "the right to rescind automatically lapses" no later than three years after consummation of the transaction. 12 C.F.R. Part 226, Supp. I, para. 23(a)(3)-3.[5]

Obviously, the regulation and commentary largely parrot the statutory language. Nevertheless, the regulation admits no additional exceptions and thus facially confirms that the expiration period cannot be extended for any reason other than the pendency of an enforcement

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[5] The commentary provides in relevant part that

> [w]hen the creditor has failed to take the action necessary to start the three-business day rescission period running, the right to rescind automatically lapses on the occurrence of the earliest of the following three events: [1] The expiration of three years after consummation of the transaction[;] [2] Transfer of all the consumer's interest in the property [; or] [3] Sale of the consumer's interest in the property . . . .

12 C.F.R. Part 226, Supp. I, para. 23(a)(3)-3.

action by an administrative agency enforcing TILA. See 12 C.F.R. § 226.23(a)(3) (only "[i]n the case of certain administrative proceedings" is the period *"extended"*) (emphasis added).

In sum, the Court need look no further than § 1635(f) to answer the question it propounded. Congress created a federal right of rescission and imposed an "outside limit" during which the remedy is available, whether it is asserted affirmatively or not. The federal right of rescission, which is extremely favorable to borrowers, is restricted by an absolute three-year expiration period. Fidelity to Congress's manifest intent, as embodied in the directly relevant language, requires rejection of petitioners' attempt to revive their federal right of recission five years after the transaction being challenged has been consummated.

B. The Structure Of TILA's Remedial Provisions Demonstates That Congress Did Not Intend To Extend The Federal Right Of Rescission By Way Of Recoupment.

Although any fair reading of § 1635(f) compels the conclusion that the federal rescission right is strictly cabined by a three-year expiration period, the Court has indicated that statutory construction is a "holistic endeavor." *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). Accordingly, the Court routinely examines the relationship between the directly relevant text and the broader context provided by related provisions in the statute and relevant decisional law. In this case those sources merely reinforce the plain intent that assertions of a federal right of rescission will not be heard more than three years after the loan is consummated.

The contrast between § 1635 and § 1640 of TILA concerning the treatment of the limitations periods and the availability of recoupment reveals plainly that Con-

gress understood the role of recoupment in reviving claims barred by an ordinary statute of limitations and that Congress intended not to permit the expiration period in § 1635(f) to be extended by reliance upon recoupment. First, the language imposing a deadline for bringing a private damages action under § 1640 is that traditionally used in literally hundreds of statutes of limitation enacted by Congress. "Any action . . . may be brought . . . within one year from the date of the occurrence of the violation." 15 U.S.C. § 1640(e). This empowering language stands in striking contrast to the rights restricting language quoted above concerning the expiration period for asserting a federal right of rescission. This difference alone suggests that Congress intended the language in § 1635(f) to have a much stricter interpretation than is generally applied to mere statutes of limitation.

But Congress went even further in § 1640(e) and expressly recognized and addressed the issue of the effect of the limitation period on the assertion of a "defense by recoupment or set-off" against an action by the lender to collect the underlying debt from the borrower. There, in sharp contrast to the treatment of the three-year expiration period in § 1635(f), Congress declared that the one-year limitation period was not a bar to "recoupment or set-off." Thus, as happened in this case, the borrower is permitted to assert actual and statutory damages to reduce the overall debt owed to the lender. The absence of any language in § 1635 that grants the right of recoupment or set-off after the three-year period for rescission has expired strongly evidences Congress's intent not to authorize the courts to formulate a rescission right that can be asserted after the statutory period has expired. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally

and purposely in the disparate inclusion or exclusion") (internal quotation marks omitted).[6]

That Congress did not intend the courts to go beyond their statutorily conferred powers in devising remedies for violations of TILA is made plain by 15 U.S.C. § 1610(d). There, Congress declared in relevant part that, except as provided explicitly in §§ 1635 and 1640, "the validity or enforceability of any contract" is unaffected by TILA and its regulations. Congress thus narrowed the available remedies for the enforcement of violations of TILA to those provided in the specific enforcement provisions of the Act. If respondent is correct that §§ 1635 and 1640 do not authorize rescission as a matter of federal law after the three-year period has expired, then § 1610(d) must prevent the courts from looking beyond those provisions to find a rescission remedy for a TILA violation that will interfere with the ordinary enforcement of the loan agreement.

C. Congress Relied Upon State Law To Provide Any Right Of Rescission After The Three-Year Period For Asserting A Federal Right Of Rescission Has Expired.

Petitioners and their *amici* make the essentially nonstatutory argument that rescission should be available because it will protect borrowers from unscrupulous lenders and will ensure that lenders comply steadfastly with their obligations under TILA. By interpreting § 1635(f) ac-

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[6] Petitioners assert in passing (Br. 22-23) that their interpretation of TILA as permitting a federal right of rescission in recoupment is supported by § 1640(e), which expressly preserves an otherwise barred claim for damages to be asserted as a set-off or in recoupment. That provision, however, cannot be stretched, as petitioners suggest, to provide explicit statutory support for extending the period that "shall expire" after three years under § 1635(f). Section 1640(e)'s direct reference to "one year from the date of the occurrence of the [TILA] violation" plainly shows the subsection is aimed exclusively at claims for damages under TILA that are governed exclusively by § 1640.

cording to its plain meaning, however, the Court will not render borrowers powerless to protect themselves against predatory lenders. Congress provided a safety net in § 1635(i)(3), by making clear that "[n]othing in this subsection affects a consumer's right of rescission in recoupment under State law." Thus, Congress was explicit that, even though it temporally restricted the federal right of rescission, it in no way meant to pre-empt the borrower's state law rescission rights if available in recoupment. Thus, although lenders are protected by § 1635(f) from the extraordinary federal rescission remedy in TILA after three years, TILA does not provide any protection from an asserted defense of rescission provided by state law for fraud or other misconduct. See 1 Jay M. Lee, *Black's Treatise on the Rescission of Contracts and Cancellation of Written Instruments* § 14 at 21 (2d ed. 1929) (identifying the general rule that "a contract properly entered into by competent parties . . . can[] be rescinded . . . [if] he is able to show the existence of some well-recognized title to equitable relief, such as fraud, mistake, or duress").

Congress's reference to state rescission rights in recoupment strongly reinforces the conclusion that § 1635(f) should be read as providing an absolute bar to the assertion of a federal right to rescission after the three-year period has expired. Clearly, Congress was not oblivious to the interrelationships between legal and equitable remedies under TILA or to the interplay between federal and state law. Indeed, Congress acted with striking clarity in placing the federal rescission right precisely into the broader mix of state and federal protections for borrowers.

Petitioners' argument that Congress's addition in 1995 of § 1635(i)(3) supports their position is seriously flawed. Section 1635(i)(3) is merely a savings clause that, by its terms, is limited to the effect of "this subsection." The operative provisions of the rescission rights granted by that "subsection," which are found in clauses (1) and (2), are expressly subject to the three-year time

limit in § 1635(f). Congress's express incorporation of the three-year limit simply cannot be reconciled with any reading of § 1635(i)(3) that expands the rescission right beyond the absolute expiration date mandated by that provision.

Second, if Congress intended to permit a federal right of rescission in recoupment without regard to the three-year expiration period, then there would be no reason to preserve a state law right of rescission in recoupment. It is only by assuming that Congress intended categorically to restrict the federal rescission right that it makes sense for Congress to be concerned that an argument could be made that any state law right of rescission in recoupment might be pre-empted.

Third, petitioners' analysis of § 1635(i)(3) improperly conflates the analysis of the relevant state and federal remedies. Petitioners cannot mix and match their federal and state law remedies without doing violence to both federal and state law. They clearly had a federal right of rescission, but that right expired by its own terms. There is no express provision for a federal right of rescission to be asserted in recoupment and Congress declared in 15 U.S.C. § 1610(d) that its carefully crafted remedial scheme should not be supplemented. Petitioners received damages by way of recoupment or set-off as Congress clearly provided in § 1640. There may be a state right of rescission that might be asserted in recoupment, but that right plainly would require a showing of fraud, duress, or coercion to support rescission. No such claim has been alleged much less proven.

What petitioners appear to want is the federal right of rescission, which merely requires proof of certain types of TILA violations, coupled with the state right of recoupment, which presumably is not restricted by a three-year expiration period. The problem with such an analysis is that it conflicts with Congress's express intent in both § 1635(f) and § 1635(i) to restrict temporally the federal right of rescission to three years and it expands signifi-

cantly state law by permitting rescission in circumstances where Florida does not otherwise authorize the extraordinary use of this equitable remedy. There is no justification in law or logic for such an outcome so wholly at odds with both legal systems. Indeed, this Court has recognized expressly that state law exceptions should not be applied to federal limitations statutes because such an unintended mixture of federal and state law would be inconsistent with federal policies of establishing uniform national limitations on federal statutes. See *Burnett* v. *New York Cent. R.R.*, 380 U.S. 424, 433 (1965).[7]

Finally, where, as here, Congress's intent is reflected unambiguously in the language and structure of the statute, resort to legislative history is unnecessary. See, *e.g.*, *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992). Nevertheless, what little relevant history there is certainly casts no doubt on the correctness of respondent's interpretation of §§ 1635(f) and 1640. First, the inclusion of a three-year expiration period was urged by the Federal Reserve Board to eliminate clouds on title, which arise out of the uncertainty of a temporally unrestricted right of rescission for mere technical violations of TILA. Board of Governors of the Federal Reserve System, *Annual Report to Congress on Truth in Lending for 1972* 15-16 & App. D at 2 (Jan. 3, 1973). This same uncertainty also creates obstacles to assigning mortgages. Congress enacted the amendment in 1974 without any direct discussion. H.R. Conf. Rep. No. 93-1429, at 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6148, 6152 (describing the amendment as merely part of miscellaneous changes).

When Congress amended TILA in 1995, it added subsection (i), which provided special new rescission rules

[7] Even if Congress intended to allow state recoupment law to apply to the assertion of federal statutory rescission rights, the result would be the same in this case because the Florida Supreme Court held that Florida recoupment law could not be used to assert the TILA rescission claim after three years.

for foreclosure actions and preserved any state law right of rescission in recoupment from implied pre-emption under TILA. Truth in Lending Amendments of 1995, Pub. L. No. 104-29, §§ 5, 8, 109 Stat. 271, 275-76 (1995). The floor managers in urging these changes were emphatic that the effect of the 1995 amendments would not modify the requirement that a right to rescission still must be exercised within three years of the loan closing or be barred forever. 141 Cong. Rec. S14568 (daily ed. Sept. 28, 1995) (statement of Sen. Mack); 141 Cong. Rec. H9514-9516 (daily ed. Sept. 27, 1995) (statement of Rep. McCollum). These discussions concededly are, at best, of only marginal help in interpreting 1635(f), but they do confirm the interpretation compelled by the language of the statute and reflect that nothing in the 1995 amendments altered the absolute three-year expiration period.

Finally, petitioners and their *amici* argue at length that the failure to enact bills proposed in 1995 that would have terminated all rights of rescission after three years somehow supports their argument that the expiration period in § 1635(f) does not bar a federal claim for rescission in recoupment. In fact, what that history reveals is that Congress was unwilling to pre-empt state law rights of rescission in recoupment. All of the previous bills provided for pre-emption and the final legislation as enacted preserved state law as a safety net while maintaining the absolute three-year expiration period for assertions of a federal right of rescission. Far from supporting petitioners' interpretation, this legislative history demonstrates that Congress was unusually careful in crafting its remedial scheme and that scheme does not leave room for a judicially-created federal right of rescission in recoupment, which is what petitioners propose.

At the end of the day, Congress created an extraordinary federal right of rescission that contained an unambiguous expiration date. Congress also authorized more conventional remedies under federal law and made them

subject to an ordinary statute of limitations. Congress went further and ensured that any right to damages could be asserted defensively as a matter of federal law in recoupment or set-off, even after the statute of limitation has expired. Congress also declared that nothing in this scheme would pre-empt any state law claim of rescission in recoupment that a borrower might assert. It is simply fanciful to suggest that Congress in carefully enacting this scheme meant to impose an absolute three-year restriction on the federal right of rescission that can be completely undone simply by having the borrower stop making payments on his or her loan and then seeking to obtain a federal right of rescission in recoupment that is nowhere provided for in TILA.

D. Under This Court's Decisions, Congress's Statutory Scheme in TILA Eliminates Any Basis For Creation By Courts Of A Federal Defense Of Rescission By Way Of Recoupment.

Notwithstanding the clarity with which Congress has spoken in restricting the time for asserting a federal rescission claim, petitioners and their *amici* urge the Court to imply a federal right to proceed after the three years have expired by way of recoupment as a defense to petitioner's foreclosure action. The source of law for the TILA rescission claim in recoupment is not plainly stated by petitioners. Pet. Br. 15 (" 'Recoupment' is a widely recognized common law defense"). They make no effort to argue that it has an explicit federal statutory basis and they have never asserted a state law right of rescission that would be enforceable by way of recoupment or otherwise. Thus, it would appear that this rescission in recoupment must exist, if at all, as a matter of federal common law.

Simply because this Court in other contexts has found a federal common law basis for recoupment does not, however, lead inexorably to the conclusion that there is a federal common law right of rescission in recoupment that applies in the Truth in Lending Act context. This

Court has recognized since *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78 (1938), that "[t]here is no federal general common law." See *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 83 (1994). Thus, the Court cannot merely assume that the right asserted by petitioners in fact is available here. See *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779 (1952) (rejecting recoupment in Shipping Commission Act cases).[8]

1. *There is no basis for supplementing Congress's carefully reticulated remedial scheme by providing a judicially created federal common law remedy in recoupment.*

It cannot be gainsaid that Congress has entered the field governing the relationship between borrowers and lenders concerning the consequences of the lender's failure to provide certain information in connection with a par-

[8] Even if the Court undertook to create a federal common law rule to supplement the remedies Congress has provided in TILA, it is hardly obvious the Court would adopt "rescission in recoupment." Traditionally, recoupment has been associated almost exclusively with a damages remedy and rescission is a distinctly separate equitable remedy. Indeed, Congress seems to have recognized this distinction in §§ 1635 (rescission) and 1640 (recoupment of damages). Plaintiffs in state courts thus typically are required to elect between the two remedies. *See, e.g., Thompson* v. *Rhodehamel*, 127 P. 572, 573 (Wash. 1912) (litigant must elect between recoupment and rescission); *Loma Vista Dev. Co.* v. *Johnson*, 180 S.W.2d 922, 924 (Tex. 1944) (identifying rescission and damages in recoupment as distinct remedies); *Dunlap* v. *Peirce*, 168 N.E. 277, 280 (Ill. 1929) (rescission and damages in recoupment are distinct remedies); *Morris Plan Leasing Co.* v. *Bingham Feed & Grain Co.*, 143 N.W.2d 404, 413 (Iowa 1966); *Cockrum* v. *Pattillo*, 439 S.W.2d 632, 643 (Ark. 1969) (election of remedies between rescission and recoupment required). *But see Ed Miller & Sons, Inc.* v. *Earl*, 502 N.W.2d 444, 453 (Neb. 1993) (rejecting election of remedies between recoupment and rescission, but still discussing recoupment in terms of damages). Because TILA clearly eliminates any basis for the Court to supply a federal common law rule (*see* pp. 23-24, *infra*), however, there is no need for this Court to attempt to resolve the proper relationship between recoupment and rescission.

ticular lending transaction, such as the one entered into by petitioners. As described by respondent previously (*supra* pp. 3-4), Congress provided an extraordinary rescission remedy with a self-contained expiration date and a significant damages remedy that is subject to traditional rules governing recoupment. Under this Court's decisions concerning federal common law, Congress's enactments have restricted the freedom of this Court to provide additional remedies beyond those contained in Congress's carefully reticulated statutory scheme.

This Court has held repeatedly that "once Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. Thereafter, the task of the federal courts is to interpret and apply statutory law, *not create common law*." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 95 n.34 (1981) (emphasis added); accord, *City of Milwaukee* v. *Illinois & Mich.*, 451 U.S. 304, 314 (1981). The rationale for this approach is that "[o]ur 'commitment to the separation of powers is too fundamental' to continue to rely on federal common law 'by judicially decreeing what accords with "common sense and the public weal"' when Congress has addressed the problem." *Id.* at 315 (quoting *TVA* v. *Hill*, 437 U.S. 153, 195 (1978)). See *City of Milwaukee*, 451 U.S. at 317 & n.9 (even preexisting federal common law rules are subject to displacement by congressional entry into a particular field). Thus, where, as here, Congress has generally addressed the relevant subject matter in dispute and carefully provided a set of remedies, it simply is not permissible for the Court to employ federal common law to add to the remedies that Congress supplied by statute.

2. *This Court's prior decisions granting recoupment rights are readily distinguishable from this case.*

Petitioners primarily rely (Pet. Br. 15-18) upon three cases decided by this Court to support their argument that

a right of rescission in recoupment can be applied as a matter of federal common law in this case. They are *Bull* v. *United States*, 295 U.S. 247, 262 (1935); *United States* v. *Western Pac. R.R.*, 352 U.S. 59, 71 (1956); and *Reiter* v. *Cooper*, 507 U.S. 258, 265 (1993). Although petitioners treat those cases as if they obviously apply to the circumstances of this case, this effort to gloss over the general policy underlying recoupment, as well as the facts and holdings of those cases, reveals plainly the lack of support those decisions offer petitioners.

First, the general equitable underpinnings of the doctrine of recoupment relate to ordinary statutes of limitation and not § 1635(f). An ordinary statute of limitation is designed to prevent litigation of "stale claims." *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 554 (1974). If a plaintiff brings a timely claim, the doctrine of recoupment recognizes it would be inequitable for a party to be limited by an ordinary statute of limitation from asserting defensively a claim arising out of the same "stale" transaction, since the plaintiff has placed the matter before the court. As stated in *United States* v. *Western Pac. R.R.*, 352 U.S. 59, 72 (1956), "it would be incongruous to hold that once a lawsuit is properly before the court, decision must be made without consideration of all the issues in the case . . . . [I]f [the] litigation is not stale, then no issue in it can be deemed stale." In contrast, the purpose of § 1635(f) is not to prevent stale claims, but to restrict temporally the extraordinary TILA rescission remedy. That congressional purpose is honored only if the three-year period is applied regardless of whether the claim is asserted defensively or affirmatively. Thus, petitioners are flatly wrong in asserting (Br. 17-18) that the purposes of § 1635(f) would not be served in the recoupment context.

Second, none of the cases cited by petitioners involved the Truth in Lending Act and this Court's decisions make plain that the availability of a federal common law rule depends upon the nature of the federal interest implicated

in each particular case. See *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 728-729 (1979). Thus, the fact that the Court would permit a shipper to assert a federal statutory claim of rate unreasonableness in response to a demand that the shipper failed to pay the federally mandated filed rate, all of which is regulated exclusively by federal law, as in *Reiter* and *Western Pacific*, provides no guidance on what approach to take in a case, such as this one, that involves significant state law interests and conduct generally regulated at the primary level by state law. Similarly, the proper rules governing the relationship between the United States and federal taxpayers involved in *Bull* provides a much stronger argument for the Court to adopt a federal rule regulating those parties' dealings than the situation posed by the commercial relationships between an ordinary borrower and lender.

Third, the cases where the Court has imposed a federal rule of recoupment have involved strong arguments that equity compelled allowing the defendant to assert the particular claim. The Court refused in *Bull* to permit a federal taxpayer to be exposed to double taxation when the money being retained by the government in the first instance "was against morality and conscience." 295 U.S. at 260. Similarly, in *Western Pacific* and *Reiter*, the Court rejected the suggestion that a carrier could avoid having the reasonableness of its rates reviewed by waiting until the shipper's refund period had expired before attempting to collect the filed rate.

In this case, by contrast, petitioners' claim has virtually no equity and it reveals plainly why Congress wisely placed an absolute expiration date on the federal rescission right it created. First, it is obvious that petitioners were not deceived by Great Western's TILA violations. Those violations unquestionably were irrelevant to petitioners' default on the mortgage. Thus, to ignore the plain language of § 1635(f) in this context leads to a

result that is precisely the opposite of the rationale that motivated the Court to apply recoupment in *Bull*, *Reiter* and *Western Pacific*. To grant rescission in addition to the recoupment or set-off already granted pursuant to § 1640 will confer a completely unwarranted windfall upon petitioners.

Moreover, petitioners' entire argument begs the central question of statutory interpretation, *viz*, is the three-year expiration period an ordinary statute of limitation. For reasons fully discussed above (pp. 15-16 *supra*), § 1635(f) plainly is not a mere statute of limitation. It does not use the language of traditional statutes of limitation and its purpose is not to avoid litigating stale claims. Thus the rule in *Bull*, *Western Pacific* and *Reiter*, which applies only to ordinary statutes of limitation, has no application here.

Ultimately, this case is like *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779 (1952), which petitioners ignore, where this Court rejected the availability of recoupment as inconsistent with the overall purpose of the Shipping Commission Act to protect the income of sailors. *Isbrandtsen* undermines petitioners' repeated argument that Congress must act with unusual clarity to bar recoupment.[9] Under *Isbrandtsen*, recoupment should be barred whenever that is the plain intent of Congress, no matter how that intent is expressed. Here, of course, Congress has been as clear as it can be. The federal recission right expires for all purposes three years after the transaction.

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[9] Petitioners repeatedly urge the Court to adopt a "clear statement" rule in this case. The point is academic, however, because Congress has spoken clearly enough. Moreover, *Isbrandtsen* certainly casts doubt on the existence of a rule requiring "magic words" to eliminate recoupment as a defense to a particular claim.

E. Section 1635(f) Reflects Congress's Recognition That A Federal Right Of Rescission For Violations Of TILA That Lacked An Absolute Three-Year Time Limit Would Grant Unwarranted Windfalls To Borrowers, Would Impose Unjustified Penalties On Lenders And Particularly On Their Assignees And Would Severely Disrupt And Harm Secondary Mortgage Markets.

Petitioners offer three policy arguments that allegedly support their interpretation of § 1635(f) as permitting rescission to be asserted in recoupment more than three years after the transaction is consummated. Obviously, policy arguments, no matter how strong, cannot override plain statutory language and clear evidence of Congressional intent. See *United States* v. *Dalm*, 494 U.S. 596, 610 (1990) (equitable recoupment should not be used to "overrid[e] Congress' judgment as to when equity requires that there be an exception to the limitations bar."); *Rothensies* v. *Electric Storage Battery Co.*, 329 U.S. 296, 303 (1946) (equitable recoupment should not encroach on the policy of the statute). In this case, however, petitioners' policy arguments are strikingly hollow and the policies served by restricting the federal right of rescission to three years are so powerful that they reinforce the conclusion that Congress unquestionably meant what it said when it declared absolutely that the federal right "shall expire."

First, petitioners assert that the three-year period will permit lenders to undermine TILA by refusing to bring a foreclosure action until after three years. This argument overlooks § 1640. Borrowers still can and will assert TILA violations in response to foreclosure actions because of the statutory damages and attorneys' fees available under that provision. Thus, TILA will still be enforced even after the rescission period has expired.

Moreover, it is fanciful to think that rescission is necessary to provide lenders with an incentive to comply with TILA. A two-thousand dollar penalty and actual compensatory damages and attorneys' fees are significant reasons to comply with federal law, especially when a TILA violation many times affects a substantial number of loans. In addition, rescission is still available for up to three years and no reasonable lender would ignore so powerful a remedy in deciding whether to comply with TILA. Finally, if rescission were absolutely essential to the effective enforcement of TILA, Congress would not have excluded purchase money loans from the rescission right and would not have adopted an expiration period that applies only to the right of rescission.

Nor is a federal right of rescission necessary to protect borrowers from genuinely nefarious lenders. Congress's express decision not to pre-empt state rescission law protects borrowers from fraud, coercion or duress in connection with loan transactions, just as states have been protecting consumers for centuries.

On the other hand, the rescission right, if asserted in recoupment many years after the loan is consummated, grants the borrower an enormous windfall. The *amici curiae* brief of Federal Home Loan Mortgage Corporation, *et al.*, provides a relatively simple illustration of the breathtaking scope of relief available to a borrower and demonstrates plainly the excessive nature of the remedy, particularly for errors that are largely technical and unintentional as in this case.

In their example *amici* hypothesize a $100,000 loan with simple interest and no origination charges and they demonstrate that the effect of the exercise of a federal right of rescission eight years after the transaction closed would be the difference between $92,248.77, which is the outstanding loan balance that the lender reasonably should have expected to recover, and $21,951.60, which is the amount the lender theoretically will receive under petitioners' interpretation. Given the likelihood that many of the borrowers who default on their mortgages are in

bankruptcy or unable to repay their loans, the lender's realistic prospect of recovering even the full $21,951.60 of an unsecured claim is very slim. In sum, *amici*'s point is powerful. The right to rescission embodied in § 1635 is extraordinary and allowing it to survive the three-year expiration period will have significant harmful consequences both to the individual lender and for the mortgage markets more generally. See Freddie Mac Br. 15-19.

Of course, the impact of a federal rescission remedy in recoupment is particularly unfair when it is applied to an assignee and not to the original lending institution. If Congress had meant to impose such a burden on innocent assignees, it would be reasonable to expect the statute to say so expressly. Moreover, the need for a measure of certainty in the law to promote a secondary market in mortgages is completely undermined by the creation of a right to rescission that assignees cannot meaningfully evaluate prior to accepting a mortgage. Only one certain result flows from the federal right of rescission in recoupment asserted by petitioners: the cost of borrowing will increase for all consumers. See Freddie Mac Br. 16-17.

To be sure, Congress could enact legislation that would do so little to promote the objectives of TILA and so much to harm borrowers and the mortgage markets, but the language Congress inserted into § 1635(f), which temporally restricts the federal rescission right, plainly was not such legislation. In sum, the Court should reject petitioners' invitation to judicially rewrite the statute and upset the balance of interests Congress struck in the remedial provisions of the Truth in Lending Act.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

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